

CERTIFIED FOR PARTIAL PUBLICATION\*  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO BARRERA AGUILAR,

Defendant and Appellant.

2d Crim. No. B163793  
(Super. Ct. No. 1072378)  
(Santa Barbara County)

Defendant forcibly moved his intended rape victim 133 feet at night into an unlit area where he was less likely to be detected. Such movement is not merely incidental to the crime of kidnapping to commit rape. It also increases the risk of harm to the victim and supports a conviction of aggravated kidnapping.

Sergio Barrera Aguilar appeals a judgment after conviction of kidnapping to commit rape and sexual penetration (Pen. Code, § 209, subd. (b)(1),<sup>1</sup> count one), with a finding that he used a deadly weapon (§ 12022.3, subd. (a)), among other things. [[He was also convicted of sexual penetration (§ 289, subd. (a)(1), counts two and three), assault to commit rape (§ 220, count four), grand theft person (§ 487,

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

subd. (c), count five), assault with a deadly weapon (§ 245, subd. (a)(1), count six), and attempting to dissuade a witness (§ 136.1, subd. (a)(2), count seven).]]

The jury made additional special findings that Aguilar personally used a knife, that he inflicted great bodily injury and that "the movement of the victim in the course of the kidnapping substantially increased the risk of harm to her." (§ 667.61, subds. (c)(5), (d)(2).)

[[The court sentenced Aguilar to an aggregate determinate term of 11 years for counts two, four, five, six and seven, to run concurrent with an indeterminate 28-year-to-life sentence on counts one and three.]]

We conclude, among other things, substantial evidence supports: 1) the conviction for aggravated kidnapping, and 2) the finding that Aguilar substantially increased the victim's risk of harm by moving her. [[The sentence of 25 years to life on count one and the additional 3 year deadly weapon enhancement for that count is unauthorized. Therefore, the sentence on count one is modified to reflect an indeterminate sentence of life with the possibility of parole, which is stayed. (§ 654.) In all other respects the judgment is affirmed.]]

#### FACTS

Aguilar followed Nancy C., age 16, as she walked her dog down a residential street at night. He grabbed her and said "he was going to take [her] somewhere and rape [her]." He inserted his fingers in her vagina and she screamed. He then removed his hands from her vagina and pulled her 133 feet down the sidewalk past a house with a lit porch light to an area in front of a house with no light. He pushed her face down onto the hood of a car, "put his hands down [her] pants" and inserted his fingers in her vagina.

Police Officer James Ella testified that the area to which Nancy C. was moved was "extremely dark. Trees blocked "most of the illumination" coming from the light down the street. In a videotaped confession, Aguilar admitted he had grabbed Nancy C., was aroused, and put his fingers in her vagina. He said he moved ""to a place where nobody could see [them]" to have intercourse with her. He admitted that

what he did was "wrong" and that Nancy C. did not consent to have sex with him. He said he had a knife with him, but he "didn't pull the knife out."

Martin Molina, a nearby resident, testified that his porch light was the "only light on the street" between the area where Aguilar first grabbed Nancy C. and the location to which she was ultimately dragged. He said the first area was lighter because trees and bushes "[funnel] the light" from his porch light to that area. They deflect light away from the area where the attack ended.

Anthony Ventura Castillo was at home when he heard a woman screaming "help, help" and "save me." He testified it was so dark he had to turn on the porch light to see what was happening. He saw Aguilar throw Nancy C. to the ground and grab her by the neck. Aguilar was holding a knife "12 or 13 inches from her neck." Castillo told him to release her. Aguilar "got up and ran." Castillo and his brother chased Aguilar and apprehended him.

[[Billie Diane Pauletto, a sexual assault nurse, testified she examined Nancy C., who had numerous injuries which were consistent with a sexual assault. She saw bite marks, marks consistent with choking, and injuries caused by "blunt force" trauma. Nancy C. had scratches and abrasions to her arms, face, neck, back, elbow, clavicle and wrist. She had a laceration on her "vaginal wall" which was a "very significant injury."

Aguilar did not testify.

#### *Motion To Admit Impeachment Evidence*

Aguilar moved to introduce evidence that Castillo had been charged with the misdemeanor of annoying a child. (§ 647.6, subd. (a).) The police report alleged that he had kissed a 13-year-old girl on the lips and cheeks. Castillo had received neither immunity nor promises from the prosecution in exchange for his testimony. The court denied the motion, relying on Evidence Code section 352.]]

## DISCUSSION

### I. *Sufficiency of Evidence for Aggravated Kidnapping (Count One)*

Aguilar contends the evidence is insufficient to support the aggravated kidnapping conviction.

We view the evidence in the light most favorable to the judgment and resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. (*People v. Hatch* (2000) 22 Cal.4th 260, 272; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Kidnapping to commit rape involves two prongs. First, the defendant must move the victim and this asportation must not be 'merely incidental to the [rape].' [Citation.]" (*People v. Shadden* (2001) 93 Cal.App.4th 164, 168.) "Second, the movement must increase 'the risk of harm to the victim over and above that necessarily present in the [rape].' [Citation.]" (*Ibid.*; *People v. Rayford* (1994) 9 Cal.4th 1, 12; *People v. Daniels* (1969) 71 Cal.2d 1119.)

For aggravated kidnapping "' . . . there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong.'" (*People v. Martinez* (1999) 20 Cal.4th 225, 233.) "Where movement changes the victim's environment, it does not have to be great in distance to be substantial." (*People v. Shadden, supra*, 93 Cal.App.4th at p. 169.)

"[W]here a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." (*People v. Shadden, supra*, 93 Cal.App.4th at p. 169 [defendant moved rape victim from front area of a store in public view nine feet into a closed back room]; *People v. Jones* (1999) 75 Cal.App.4th 616, 629-630 [kidnapping for robbery affirmed where defendant moved victim 40 feet into a car "no longer in public view"]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [defendant moved victim 40 to 50 feet from a driveway "open to street view" into a camper at the rear of the house]; *People v. Salazar* (1995) 33 Cal.App.4th 341, 348 [conviction for kidnapping with intent to rape affirmed where defendant moved victim 29 feet from outside walkway into a motel bathroom].)

Aguilar contends that unlike *Shadden* and *Salazar* he did not move Nancy C. into "a hidden location" such as a bathroom or a back room of a store. He says, "[t]he movement was down the sidewalk," an open area. But this distinction is not dispositive. Courts have held that moving a victim to a more isolated open area which is less visible to public view is sufficient. (*People v. Diaz* (2000) 78 Cal.App.4th 243, 248-249 [defendant moved victim from a well lit area to the back of a recreation center; the court stated, "the risk to the victim in the dark isolated location of the attack increased significantly as compared to the lighted sidewalk . . . where the incident began"].)

In *Rayford* the defendant forcibly moved the victim 105 feet at night from the parking lot of a closed store "to the other side of a wall located at the edge of the lot." (*People v. Rayford, supra*, 9 Cal.4th at p. 23.) *Rayford* affirmed the kidnapping conviction noting that "a slender tree," 34 feet from the street, and bushes at the end of the wall "limited detection" of the victim. (*Id.*, at pp. 6, 23.) Under these circumstances there was sufficient evidence that the forcible movement of the victim was not merely incidental to the attempted rape, but substantially increased the victim's risk of harm. (*Id.*, at p. 23.)

Here Aguilar forcibly moved Nancy C. 133 feet down a sidewalk at night, from an area illuminated by a porch light to an "extremely dark" area. The "risk to [Nancy C.] in the dark . . . increased significantly . . . ." (*People v. Diaz, supra*, 78 Cal.App.4th at pp. 248-249.) Aguilar admitted his goal was to move her "to a place where nobody could see [them]." The movement "decreased [Aguilar's] likelihood of detection . . . ." (*People v. Rayford, supra*, 9 Cal.4th at p.13.)

A reasonable trier of fact could infer this increased her risk by making it harder for her to escape and "enhanced [Aguilar's] opportunity to commit additional crimes." (*People v. Rayford, supra*, 9 Cal.4th at p. 13.) Moreover, "[a]n increased risk of harm was manifested by appellant's demonstrated willingness to be violent . . . ." (*People v. Jones, supra*, 75 Cal.App.4th at p. 630.) He pulled Nancy C. down the sidewalk, threw her to the ground, grabbed her neck, choked her, bit her, slammed her

onto a car hood, held her face down and held a knife near her neck. He told Nancy C. that he was moving her to rape her which, when coupled with his violent acts, "pose[d] a substantial increase in the risk of psychological trauma . . . beyond that to be expected from a stationary" sexual attack. (*People v. Nguyen* (2000) 22 Cal.4th 872, 886.)

Aguilar contends that he did not complete his goal because Castillo rescued Nancy C. But that "'does not . . . mean that the risk of harm was not increased [by the movement].'" (*People v. Martinez, supra*, 20 Cal.4th at p. 233.) We conclude the evidence was sufficient.

## II. *People v. Hoard*

Aguilar cites *People v. Hoard* (2002) 103 Cal.App.4th 599, which analyzes "incidental movement" much differently than we did in *Shadden* and our colleagues did in *Salazar*. He argues that under *Hoard*: 1) he incidentally moved Nancy C. to a more secluded place, solely to facilitate rape, and 2) his violent conduct while moving her was "inextricably connected" to his intent to rape. Aguilar's reliance on *Hoard* is misplaced..

*Hoard* involved charges of kidnapping for robbery. Defendant had moved and tied up two women employees inside a building, and then took jewelry from display cases. The women were neither physically attacked nor sexually molested. The Court of Appeal reversed the conviction concluding that the defendant's "movement of the two women served only to facilitate the crime with *no other apparent purpose*." (*People v. Hoard, supra*, 103 Cal.App.4th at p. 607, italics added.)

*Hoard* criticizes *Salazar* and *Shadden* for equating the meaning of "incidental" with "necessary." Citing our reference to Alice in Wonderland in *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 570, the *Hoard* majority portray us and our colleagues in *Salazar* as acting like "Humpty Dumpty" by arbitrarily ascribing our own definitions to words. (*People v. Hoard, supra*, 103 Cal.App.4th at p. 606.) Our

reasoning is not scrambled. The *Hoard* dissent supports our view that here Humpty Dumpty is not off the wall.

In *Salazar*, defendant dragged his victim 29 feet down a hallway to a bathroom to commit rape. The appellate court concluded that because the movement was not necessary to commit the crime, it was not incidental to the crime. From this *Hoard* concludes that *Salazar* defines "necessary movement" to be the same as "incidental movement," a definition at odds with Mr. Webster's definition of incidental as "subordinate, or nonessential." (*People v. Hoard, supra*, 103 Cal.App.4th at pp. 605-606, fn. 20.)

As the *Hoard* dissent points out, "incidental" often means "necessary" in the context of the particular case. (See *People v. Hoard, supra*, 103 Cal.App.4th at pp. 609-612 (dis. opn. of Ramirez, P.J.).) If a robber moves the victim 20 feet in order to reach the office safe, that movement is necessary to commit the crime, but incidental to it. The *Hoard* dissent notes that the majority relied on an incomplete dictionary definition of "incidental" and "necessary." (*Id.* at pp. 612-613 (dis. opn. of Ramirez, P.J.).) Thus, *Hoard* disregarded *Rayford's* reminder that it consider "the context of the environment in which the movement occurred," to determine whether that movement was incidental to the crime. (*People v. Rayford, supra*, 9 Cal.4th at p. 12.)

*Hoard* also went astray by ignoring *Rayford's* second prong and its rationale. "[A] primary reason forcible asportation is proscribed by the kidnapping statutes is the increase in the risk of harm to the victim that arises from the asportation." (*People v. Rayford, supra*, 9 Cal.4th at p. 22.)

The *Hoard* majority relies on cases that predate *Rayford* for the conclusion that "removal from the public view does not, in itself, substantially increase the risk of harm." (*People v. Hoard, supra*, 103 Cal.App.4th at p. 607.) This may be true in some cases, but the critical factor in *Rayford's* risk of harm analysis is that "the tree and the bushes at the end of the wall *limited detection* of the victim from the street." (*People v. Rayford, supra*, 9 Cal.4th at p. 23, italics added.) As Justice Ramirez notes, "the asportation element has evolved over the years" and the view

expressed in *Hoard* is not in harmony with *Rayford*, *Diaz* and *Salazar*. (*Hoard*, at p. 615.) *Hoard* thus fails to realize there is a difference between robbery where a defendant moves a victim to target a safe, and rape where a defendant moves a victim to target her body.

*Hoard* is at odds with other cases involving the same issues. For example, in *People v. Smith*, *supra*, 33 Cal.App.4th at page 1594, the Court of Appeal concluded the movement was "not merely incidental," noting "it was *not necessary to move* [the victim] in order to perpetrate the rape." (Italics added.) Likewise, in *People v. Diaz*, *supra*, 78 Cal.App.4th at page 248, the Court of Appeal concluded, "The defendant *could have sexually assaulted the victim in the sidewalk area* where he first accosted her . . . but moved the victim, as here, to avoid detection." (Italics added.) Other cases follow this approach and consider whether the movement was necessary. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 232, italics added ["over and above that necessarily present in the underlying crime"]; *People v. Nguyen*, *supra*, 22 Cal.4th at p. 886, italics added [proper to consider substantial increase in psychological harm "beyond that to be expected from a stationary robbery"]; see also *People v. Rayford*, *supra*, 9 Cal.4th at pp. 12, 22.) *Shadden*, *Smith*, *Diaz*, *Jones*, *Salazar*, *Martinez*, *Nguyen* and *Rayford* are consistent.

It is doubtful *Hoard* would have reached the same result had *Hoard* moved the women to rape them. *Hoard* acknowledges that "a rape victim is certainly more at risk when concealed from public view and therefore more vulnerable to attack." (*People v. Hoard*, *supra*, 103 Cal.App.4th at p. 607.) Aguilar creates a subjective "apparent purpose" test to determine whether his moving the victim was incidental. He argues his "apparent purpose" in moving the victim 133 feet was to commit the rape, and therefore the movement was "incidental" to the crime. Like the *Hoard* court, Aguilar confuses the two prongs of *Daniels* as applied in *Rayford*. *Rayford* did not speculate about the defendant's subjective "apparent purpose." Instead, it decided whether "the jury could reasonably have concluded that [the victim's] movement . . . was not merely incidental" from the "totality of the



circumstances." (*People v. Rayford*, *supra*, 9 Cal.4th at pp. 12, 23.) As Justice Ramirez points out, the *Hoard* majority's reasoning is wrong because "the defendant's intent to commit kidnapping as . . . a necessary component of the target offenses is not determinate of whether the movement is incidental." (*People v. Hoard*, *supra*, 103 Cal.App.4th at p. 611; *In re Earley* (1975) 14 Cal.3d 122, 130.) He correctly notes that *Hoard* relied on an incomplete "dictionary definition" of "incidental," misunderstood *Shadden* and *Salazar* and created an irrelevant semantic strawman with the words "incidental" and "necessary." (*Hoard*, at pp. 612-613.) *Hoard* erroneously claimed there is a "seeming contradiction" in *Shadden* regarding the incidental movement prong without mentioning that it reached this conclusion by quoting *Shadden's* language about the second prong risk of harm. (*Id.*, at pp. 606, 613, fn. 8.)

The recent case of *People v. Dominguez* (2004) 118 Cal.App.4th 651 traces the historical journey of the word "incidental" through the cases and concludes its meaning is paradoxical. *Dominguez* therefore suggests that the Legislature revisit this area of the law because our Supreme Court failed "to articulate a coherent" standard. (*People v. Dominguez*, *supra*, 118 Cal.App.4th 651.) We believe *Rayford* set a clear and coherent standard. The interpretation of "incidental" depends on the facts of the particular case. In any event, the instant case is factually distinguishable from *Dominguez* and quite similar to *Rayford*. And *Hoard* is inconsistent with *Rayford*.

[[III. *Substantial Evidence that Movement Substantially  
Increased Victim's Risk of Harm* (§ 667.6, *subd. (d)(2)*)]

Aguilar contends there is no substantial evidence to support the jury's special finding that the movement substantially increased the victim's risk of harm within the meaning of section 667.61, subdivision (d)(2). This contention is without merit for the reasons mentioned in I, *ante*.

IV. *Sufficiency of Evidence for Findings of Great Bodily Injury*

Aguilar contends there is no substantial evidence to support the findings that he inflicted great bodily injury. We disagree.

For great bodily injury there is "no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted disfigurement, impairment, or loss of bodily function.'" (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) "Abrasions, lacerations, and bruising can constitute great bodily injury." (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042; *Escobar*, at p. 752.)

Here Nancy C. sustained scratches, abrasions and bruises on her face, arms, knees, back, elbow, shoulder, groin area, left clavicle area and wrist. She had bite marks on her neck. Her injuries showed he choked her. She had "red dots" on her skin which showed he inflicted "blunt force trauma." He threw her to the ground and slammed her against a car hood. Nurse Pauletto testified that taken together these injuries were "very significant." In addition, Nancy C. was a virgin who also had both "significant" vaginal lacerations and a substantial hymen injury. Aguilar used "force" and inflicted "trauma" to cause these injuries; they were not the result of mere penetration. Nancy C. complained about pain to the vaginal area and said "it burned." The evidence is sufficient.

#### V. *Impeachment of a Prosecution Witness*

Aguilar contends the trial court erred by preventing him from impeaching Castillo by showing he had been charged with the misdemeanor of annoying a child. (§ 647.6, subd. (a).) We disagree.

The trial court has discretion under Evidence Code section 352 to exclude impeachment evidence about a witness involving conduct amounting to a misdemeanor. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296; see also *People v. Frye* (1998) 18 Cal.4th 894, 896 [trial court has wide latitude to restrict cross-examination on marginal issues].)

Aguilar contends the offense shows moral turpitude. But "conduct not amounting to a felony – is a less forceful indicator of immoral character or dishonesty than is a felony." (*People v. Wheeler, supra*, 4 Cal.4th at p. 296.) "Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair

surprise, and moral turpitude evaluation which felony convictions do not present."  
(*Ibid.*)

Here Castillo was not convicted of the misdemeanor, he was only charged with one. The prosecutor advised the court that the police report said he had kissed a 13-year-old girl on the cheeks and lips, but "[t]here is no allegation of any sexual misconduct." Aguilar's trial counsel conceded that Castillo did not have immunity and there was no evidence that he would receive "any favors or reduced charges" for his testimony. Aguilar and Castillo did not have a prior history with each other because they were strangers. Aguilar did not show that Castillo had a motive to lie. The charges involving Castillo were not connected to the events relating to Aguilar's offenses. Admitting this evidence would have required a trial on a collateral issue because Castillo had not been convicted. Aguilar has not shown an abuse of discretion.

Moreover, he has not shown a reasonable probability of a different result had the court admitted the evidence. Aguilar confessed that he grabbed Nancy C. from behind, put his fingers in her vagina and intended to move her so he could rape her. He partially corroborated Castillo's testimony by admitting that he had a knife at the time he attacked Nancy C. and when he was captured.

#### *VI. The Sentence on Count One*

Aguilar and the Attorney General agree that the court erred by: 1) imposing the 25-year-to-life "one strike" sentence for his conviction of aggravated kidnapping in count one, and 2) adding a three-year deadly weapon enhancement under section 12022.3, subdivision (a) to the sentence on that count. We agree.

The "one strike law" increased the punishment for certain sex offenses to 25 years to life. (§ 667.61, subds. (a), (c), (d).) The punishment for aggravated kidnapping is "life with possibility of parole." (§ 209, subd. (b).) Here the court imposed the 25-year-to-life sentence for count one (kidnapping for the purpose of rape or digital penetration) and count three (digital penetration with movement of the victim). It found that each count involved the same act by Aguilar. A defendant may

be charged with a violation of the "one strike law" and aggravated kidnapping. (§ 209, subd. (d).) But he may not, as here, twice receive the one strike, 25-year-to-life sentence for the same act which led to convictions on the two counts. (§ 209, subd. (d); *In re Wright* (1967) 65 Cal.2d 650, 652-656.)

In addition, the three-year deadly weapon enhancement under section 12022.3 was unauthorized for count one. Count one involved a conviction for aggravated kidnapping under section 209. But the enhancement under section 12022.3 applies only to "violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a or 289 . . . ." Because we strike this three-year sentence, we need not discuss Aguilar's contention that the court improperly instructed the jury on this enhancement.

Aguilar and the Attorney General agree that the sentence on count one should be corrected to a term of life with the possibility of parole and must be stayed. (*In re Wright, supra*, 65 Cal.2d at pp. 652-655.) The clerk of the superior court is directed to modify the abstract of judgment accordingly and to forward a copy to the Department of Corrections.]] Other than the sentencing errors we have discussed in the nonpublished part of this opinion, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Denise deBellefeuille, Judge  
Superior Court County of Santa Barbara

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